

Video-sharing platforms in the revised Audiovisual Media Services Directive

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Introduction

As part of its consideration of the digital economy, the Commission carried out a review into online platforms, a group of technologies which includes social media.¹ The Commission noted that the current regime most likely to be applicable to platforms² was the e-Commerce Directive,³ which inter alia provides for neutral intermediaries to enjoy under certain conditions immunity from liability for third party content, and although it 'was designed at a time when online platforms did not have the characteristics and scale they have today', it concluded that broad support for its basic principles remained. While the Commission acknowledge some problem areas, specifically hate speech, there was no plan to revise the e-Commerce Directive and the policy narrative that the internet should not (or perhaps could not) be regulated looked to continue. That same month, however, the Commission revealed the proposal⁴ for the revision of the Audiovisual Media Services Directive (AVMSD)⁵ – a piece of legislation that had through its revision of the previous Television without Frontiers Directive⁶ caused controversy by extending EU regulation to 'video-on-demand services', the precise meaning of which is still not entirely clear. Included in the 2016 Commission proposal to amend the AVMSD was the rather startling suggestion to extend regulation to a subset of social media platforms referred to as 'videosharing platforms' (VSPs). Despite some significant opposition from some Member States and dissent between MEPs, the proposal was agreed in trilogue, with the VSP provisions remaining, albeit in somewhat different form from that originally envisaged by the Commission. In this, the AVMSD seems part of a series of legislative proposals that deal with platforms in response to a particular topic. While leaving the e-Commerce Directive seemingly intact, this approach contributes to a fragmented regulatory approach across the sector as a whole.

The purpose of this article is to provide a doctrinal analysis of the VSP provisions, specifically a consideration of the services to which they might apply, as well as a brief discussion of the measures that are envisaged. The comments are based on the version of the Directive agreed in trilogue;⁷ as reviewed by the lawyer-linguists⁸ but the text has yet to be formally approved by the Council and the European Parliament. Changes in the text are possible, though it is unlikely they would be large.

The comments on these provisions will look in some detail at the wording selected. It might be thought that this traditionally black-letter approach would be inconsistent with that of EU law, typically described as purposive or teleological. Even accepting that its interpretative approach is different from that of the domestic courts here, the Court of Justice still will, when interpreting EU law, consider the separate elements of a definition individually and in some instances meaning has turned on the use of a particular word. The definition of videosharing platform and associated terms often track the phraseology of definitions used in relation to audiovisual media services and which, in that context, have not (yet) been found to be problematic. While there were concerns about how the definition of audiovisual media services might be interpreted and applied when the AVMSD was enacted, it is submitted that these

uncertainties give rise to fewer difficulties than will arise in relation to the videosharing platform provisions. The reason is that the definition of audiovisual media services essentially seeks to differentiate mass (professional) media⁹ from user-driven media sharing. The VSP provisions seek to distinguish within this latter category between content in different formats, where the platforms used for sharing do not necessarily so distinguish. There may simply be more hard boundary cases.

The relevant provisions are found in Article 28a–28b, supported by the recitals (4)–(6) and (44)–(49). The text as approved in trilogue requires Member States to ensure that those providing VSPs take ‘appropriate measures’ to: protect minors from harm;¹⁰ and ‘the general public’ from content containing incitement to violence or hatred based on the protected characteristics listed in Article 21 of the Charter,¹¹ as well as from criminal content (incitement to terrorism, child pornography and xenophobic speech).¹² The content rules in relation to commercial communications found in Article 9(1) AVMSD in principle are extended to VSPs.¹³ Article 28a specifies a list of the sorts of measures that might be taken and also encourages co-regulation and the sharing of best practice.

Definitions and scope

A preliminary question is who is caught by these new rules. The answer to this question is dealt with through three new definitions: ‘video-sharing platform service’,¹⁴ ‘user-generated video’¹⁵ and ‘video-sharing platform provider’¹⁶. These new definitions build on some existing definitions – notably ‘programme’¹⁷ and ‘editorial responsibility’¹⁸ although these provisions have been amended too. As the definition of video-sharing platform provider is ‘the natural or legal person who provides a video-sharing platform service’, matters turn on the meaning of VSP. Article 1(1)(aa) states:

‘video-sharing platform service’ means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, usergenerated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.

The recitals acknowledge that some VSPs may be social media platforms, but clarify that social media (a term that is not defined) will fall within the Directive only to the extent that they satisfy the definition of VSP. The definition of VSP contains eight elements, of varying degrees of complexity:

1. a service within the meaning of the TFEU;
2. lack of editorial responsibility;
3. the organisation of content;

4. provision of content;
5. principal purpose of the service;
6. general public;
7. content type; and
8. the service is made available over an electronic communications network.

It would seem that these elements must all be present to satisfy the definition, as is indeed the case for the definitions relating to the services already within ambit of the Directive.

The first element may be relatively non-contentious. It is the same starting point as for 'audiovisual media services'.¹⁹ Recital (6) notes that the definition of a video-sharing platform service 'should not cover non-economic activities, such as the provision of audiovisual content on private websites and non-commercial communities of interest'. Note, however, that the impact of including 'user generated content' may mean that content elements which may not usually satisfy the requirement of being an economic service – that is normally provided for remuneration – needed to fall within EU law in general,²⁰ and Articles 56 and 57 TFEU in particular, could nonetheless indirectly be regulated by the Directive which addresses the sites on which such content is found and requires them to take action in relation to certain content found there. It should also be noted that the Court of Justice has historically taken a broad approach to the finding of such remuneration; notably free content that is supported by advertising revenue will be deemed to satisfy this economic element. It seems likely that this reasoning would apply to many internet services,²¹ as well as some 'amateur' content providers who receive remuneration because of the number of page views or because they sponsor particular products and services. It has been noted that '[t]he fact that new ways of monetising private content have appeared makes this distinction between commercial and private content even more unclear'.²²

'Editorial responsibility' is another defined term in the Directive.²³ It requires the service provider to have control over the content in terms of the selection of programmes to be broadcast or made available. Editorial responsibility does not concern decisions about the content in relation to individual programmes. This follows from the reference to 'organisation' of content. Essentially it relates to the decision of what goes in a channel, but would not seem to cover the bundling of channels together – and certainly under the original AVMSD the recitals made it clear that mere transmission was not sufficient.²⁴ Having this aspect of control is a key element to the finding that a person is a responsible service provider in respect of an audiovisual media service. With the definition of VSP, what is important is that the service provider has no such responsibility in relation to the content provided via the platform; presumably the negative possibility of taking content down is not sufficient to constitute editorial control.²⁵ In practice, it may be that the key importance of this element is in distinguishing between audiovisual media services

and video sharing platforms. It is impossible for the same service to satisfy both definitions; they are mutually exclusive groups. The fact of not having editorial control would not be that useful in terms of distinguishing between video sharing platforms and other 'information society services'²⁶ as they none of them would have editorial control.

The definition of VSP requires that the provider determines the organisation of the content, and gives a non-exhaustive list of the means which may be employed so to do: by automatic means or algorithms in particular by displaying, tagging and sequencing. It is the ability to organise content that justifies the imposition of obligations to protect users from harmful illegal content.²⁷ While this might seem straightforward, it should be noted that on-demand and broadcast audiovisual media providers are also required to organise content – via a catalogue or schedule respectively. In the case of these audiovisual media service providers, however, this fact of organising content is relevant to the question of editorial control. It could then be suggested that the difference between the two types of service is not organisation per se but rather goes to the fact that audiovisual media services providers need also to have control over selection. There may come a point, however, where selection becomes less important than prioritisation or prominence. At this point, selection starts to blend into organisation.

As regards the description of the service that a VSP provider provides, there were changes in the text of the Commission's proposal from both the Council and the Parliament. The original Commission proposal referred to the 'storage' of a 'large amount' of content; similar language was also found in the Commission's proposal for a new copyright Directive.²⁸ This raises the question of the extent to which the two Directives – aimed at different objectives – were intended to have common interpretive elements. The Council amendments to the AVMSD proposal sought to remove the phrase 'large amount of', while the European Parliament suggested that the activity was not 'storage' but the 'making available' of such videos 'to the general public', phraseology which again recalls the copyright regime. This change was not, however, accepted. It seems that the Council's concern was to make it clear that live streaming sites did not fall within the AVMSD and might be regulated under national rules, as can be seen in Council proposed recital 29a.²⁹ In the end, the Council abandoned this position, seemingly accepting that live streaming does fall within scope of the revised AVMSD. The removal of the term 'storage' does have the advantage that we do not have to face the question of whether sites with auto-destruct functions (eg Snapchat) satisfied the definition. The compromise reached refers to the 'providing of' content, phraseology that reflects the wording in relation to the definition of audiovisual media services. What, however, does 'providing' in the context of VSPs mean? Does it mean that the content is hosted on the video-sharing platform – returning us to the issue of storage – or does it include indirect access, notably via the use of links? It may be that this broader interpretation is intended: the recital specifies that VSPs provide access to the audiovisual content.³⁰

The definition of VSP also specifies that the service should provide audiovisual content in order to inform, entertain or educate. This phrasing tracks the definition of audiovisual media service.³¹ When the amendments introducing the original AVMSD were enacted, this element of the definition was somewhat unclear: what would a service look like that was not intended to inform, entertain or educate? There was

some suggestion that the intention was to exclude audiovisual material that had no editorial element – such as traffic cams³² – but other commentators took the view that these elements were ‘so vague and general that they can apply to virtually any type of audiovisual content’³³. In the recent *Peugot* decision,³⁴ the Court of Justice held that a YouTube channel comprising promotional videos could not be said to inform, entertain or educate because of this promotional purpose; and that the videos themselves could not be considered programmes or commercial communications within the meaning of the AVMSD. The ruling did not extend to the consideration of YouTube’s role, as it was determined under the 2007 version of the AVMSD. Is the consequence of this ruling that commercial channels/accounts do not count for assessing the principal purpose of a VSP?

Determination of the platform’s principal purpose – that is the service it provides – is central to finding whether the platform is subject to regulation. There are two approaches:

- principal purpose; and
- essential functionality.

There is no guidance as to how to assess ‘principal purpose’, though we can presumably assume a similar approach to principal purpose adopted in relation to audiovisual media services. In this there has been some difference in approach between the relevant national regulators as to whether a quantitative approach (as taken for example by OFCOM) or a more qualitative approach looking to the perception of the audience.³⁵ It is submitted that the reality lies somewhere in between, when considering how to unify a textual interpretation with the practical question of evidence. Principal means ‘most important’. This is not necessarily a quantitative assessment about the amount of each type of content on a particular VSP; certainly it is unlikely that ‘principal’ should be equated to ‘most’ or ‘the majority’. Nonetheless, it is likely that such numbers would give some sort of insight into the relative importance of various types of content.

‘Purpose’ might suggest that there is a subject element to the test, but it is more likely that this element would be assessed by reference to how the service is used not how the operators thought it would be used.

‘Principal purpose’ can be sub-divided into:

- situations where the principal purpose of the entire platform is the provision of relevant content; or
- where the principal purpose of a dissociable part of the platform service is the provision of relevant content.

In the latter situation, only that section of the platform is covered by the video sharing platform provisions.³⁶ This idea of a dissociable part again parallels the approach taken with regard to determining whether a website could fall within the definition of audiovisual media services³⁷ which is derived from the approach of the Court of Justice in *New Media Online*³⁸ to determining whether a video section on a

newspaper website could be considered an audiovisual media service. In the case before the court, it could; significantly, the videos were found in a separate, stand-alone element of the website and most were not linked to the news stories. They were then deemed to fall within the regulatory scope of the Directive. This reasoning has been imported in to the recitals of the revised AVMSD.³⁹ From this, it seems as though a dissociable element is a consideration of the structure of the site. In most social media platforms, however, the ability to post/share videos is integrated with the other types of content from the perspective of the user (even if the service provider stores different types of file in different locations/ files and/or allows a user to search by file type); this might suggest that they are not dissociable in the *New Media Online* sense. Such a finding would mean the question determining the applicability of the regime is whether the principal purpose of the site as a whole is video sharing. Assuming some form of quantitative assessment of 'principal purpose', such an integrated platform would seem to have a greater chance of falling outside the regime than one where there is a clear dissociable element.

The relationship between the two options is unclear.⁴⁰ Do we start with the question of whether the principal purpose of the platform overall is video-sharing and only consider the question of dissociable element if the answer to the first question is no? This point could lead to different regulatory results where elements of a service seem distinct but where the video is dominant (eg a comments section in addition to video as on Vimeo, Dronestagr.am, YouTube or Musical.ly). If we accept the approach suggested, the principal purpose of the platform would be provision of video and therefore the platform as a whole and not just the video elements would fall within the scope of the regime. If we do not, it could be argued that the dissociable non-video elements fall outside the regime.

The 'essential functionality' test seems to be a mechanism for identifying aspects of social media services that while not principally aimed at providing videos/programmes have that functionality as an important part of the service. It is unclear what 'essential functionality' requires and whether it is a qualitative or quantitative assessment. The recitals specify that such functionality should not be 'merely ancillary to' or 'a minor part of the activities of that social media provider'.⁴¹ Is the concern here about the need to provide a functionality, even if that functionality is not often used? In these instances the text of Article 1(1)(aa) does not envisage that the platform be providing a severable service; it could be argued that a service which has video as an essential functionality falls wholly within the videosharing platform provisions. Again, the question of relationships unclear; do we only turn to essential functionality if neither of the 'principal purpose' tests bite? To say otherwise could return a dissociable non-video element to the regulatory scope of the VSP provisions.

The revised AVMSD acknowledges that this boundary may be difficult to understand from the text of the Directive; the recitals envisage that the Commission (after consulting the Contact Committee) will develop and publish guidelines on this particular point.⁴² In terms of general approach, in the context of the AVMSD, the court has interpreted the definitions with the result that the most impactful regulatory burden falls on the service.⁴³ Even so, note that under Article 28b, VSP are obliged to take measures in relation to audiovisual content only.

Content on VSPs is provided to 'the general public', as are audiovisual media services.⁴⁴ The objective of this requirement is presumably the same in both definitions – that is, to exclude private communications⁴⁵ – for example to draw the line between Facebook and WhatsApp (which also allows group interactions). There is no definition of 'the general public'. Valcke and Ausloos suggest in the context of audiovisual media services that there is a question as to whether this is requirement about the intent of the provider or whether this is a numerical assessment of actual users.⁴⁶ They argue that the services are available to the general public when they are available to anyone who wants to access the service under the generally applicable terms and conditions. The intentional element relates to the question of whether a service is targeted at specific groups (for example content aimed at travellers in relation to closed circuit broadcasting). This aspect proved difficult in the context of non-linear services and it is hard to see how it might apply to services on the open internet; this reasoning would however clarify that video-sharing on a university virtual learning environment which was limited to registered students should not be caught.

Other commentators⁴⁷ have suggested that we turn to other definitions of the phrase for assistance. In the context of copyright and television broadcasts, the court has defined the 'transmission of television programmes intended for reception by the public' as being to 'an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously'.⁴⁸ While this has a distinct technology specific element, it has been suggested that it would be possible to take the central notion of 'indeterminate number' of potential users as a starting point. The court clarified that this means 'to 'persons in general', that is, not restricted to specific individuals belonging to a private group'.⁴⁹ Looking at the copyright case law this indeterminate number has been found in the context of a pub, café-restaurant, hotel or spa establishment (there are no bars to entry even though the whole world cannot be there)⁵⁰ and in the context of the internet in *GS Media*,⁵¹ but not in the context of a dentist's surgery (because of the small number which is an identifiable group – patients- who are not mainly at the dentists for the music).⁵² In *Reha Training*⁵³ a rehabilitation centre's clientele was nonetheless held to constitute the 'public' despite the fact that people on the premises would be a reasonably small group of rehab patients. From these cases we see that in addition to indeterminacy of the group, the number of (potential) members should not be insignificant – though in many of these instances a restricted user group was accepted as constituting the public. It seems that 'public' is quite a low threshold to cross; a university learning environment used for video-sharing might not be excluded on this basis. In assessing these factors, it is the possibility of access and not the fact of whether users availed themselves of that possibility that is important; the fact that a user might have to pay for access does not seem to be a relevant criterion.⁵⁴

This concept of the public seems be used in relation to a number of (copyright) Directives, giving coherence to EU law.⁵⁵ This supports the argument that the concepts could be carried across to this content. A note of caution should, however, be expressed in relation to relying on the copyright jurisprudence without reflection: at least some of the cases were decided in the light of the purposes of the Information Society Directive, which include the establishment of a high level of protection for authors, and so the term 'public' should be understood broadly.⁵⁶ Whether such a broad understanding of the term is appropriate in the VSP context,

is another matter. Second, this case law relates to ‘the public’ rather than the ‘general public’; does this adjective have the effect of excluding services used by (some) restricted groups from the Directive’s ambit?

One question relates to whether we assess ‘general public’ by reference to those who post content (ie members) or those to whom the content is accessible and does not arise in relation to audiovisual media services given that in relation to both linear and non-linear services, the service provider is the only entity that provides content. The concern relating to audiovisual services focuses in both linear and non-linear services is the impact that such services have on the viewers.⁵⁷ The same reason justifying regulation is given in relation to VSPs⁵⁸ which could suggest that the general public is those who view, not those who post. This then would turn into a question of whether platforms allow content to be visible to non-members or not. In relation to sites which do not allow non-members to see content may depend on how many members there are (Facebook, or Instagram for example, might still be the general public even if non-members cannot see content given the size of the platform) and how open the site is to new members. Some sites have more stringent application processes, though while some might state they are invitation only (which could be a completely closed community), in practice most allow noneinvitees after vetting or after a trial membership.⁵⁹ Whether selection based on characteristics (such as wealth or age⁶⁰) means that the population group is not sufficiently general it not known; wealth is not an inherent characteristic but – depending on how wealthy members would be required to be – could relate to a small group. Age cannot be changed by an individual, but potentially the groups are large. These limitations are set at platform level; it seems unlikely that a system that allows the establishment of a sub-group (by members) within a larger framework would be sufficient to remove that platform from the definition; the regulation bites at the platform level, not at the sub-group.

The Commission proposal referred to ‘content’ but following amendments from the Council, the revised Directive’s text refers to programmes and user-generated video. Both are defined terms. Note at this point that commercial communications are not included. If the platform only or principally provides commercial communications it would therefore seem to fall outside the definition; the possible impact of the Peugeot judgment has been noted above. While the text includes the phrase ‘devoted to providing programmes, user generated videos, or both’ does ‘devoted’ imply that the content must fall exclusively within this category? Note that the word ‘devoted’ is also used in the definition of audiovisual media services and has not been given such a restricted connotation.⁶¹ Further, a broader interpretation is supported by recital (46) which accepts that VSPs carry commercial communications. Even if a narrow interpretation were to be adopted, the initial stringency of this requirement would seemed to be mitigated by the fact that this purpose need be only the principal purpose of the platform not its exclusive purpose.

The first category of content identified is that of ‘programmes’ defined in Article 1(1)(b). This is a definition that was inserted into the Directive during the previous round of revisions and was primarily intended to play an important part in delimiting the scope of regulated services. Problematically some of the wording included to tie programme to audiovisual media service provider, specifically the phrase ‘within a schedule or a catalogue established by a media service provider’,⁶² has not been

drafted to reflect the fact that it is now not just audiovisual media service providers which may provide content of the type described by ‘programmes’, which lists a range of genres. This phrase originally had the effect of clarifying that it was not the programme itself that was the subject of regulation,⁶³ a point that could equally be made as regards content on VSPs. Given VSPs and audiovisual media service providers are mutually exclusive, however, the retention of this phrase means that programmes as defined in Article 1(1)(b) can never be provided by a VSP as they must be provided by an audiovisual media service provider. Of course, audiovisual service providers may use VSPs to disseminate their content. Nevertheless, the mechanism envisaged for the framing of the content – ‘schedule’ and ‘catalogue’ – do not fit well with the techniques of organisation identified for use by VSPs – displaying, tagging and sequencing. This could just be an unfortunate blip – to be minimised by teleological interpretation – or it could mean that programmes in relation to VSPs are different from programmes found on audiovisual media services. It would seem that their essential characteristics, as understood by the Court of Justice – that is their form (ie audiovisual); their audience (a mass audience⁶⁴) and their impact on that audience,⁶⁵ could be the same.

The definition of ‘user-generated video’ (added to the AVMSD as (1)(ba)) runs as follows:

a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user.

At first glance, this looks clear enough. There are parallels here with the limitations found in relation to audiovisual media services – that is the limitation to moving images. Silent films could fall within this definition but radio⁶⁶ (or analogous services) would not be caught. Online editions of newspapers also fall outside the scope of the Directive (though what this means is somewhat unclear as we shall see below). The recitals to the revised Directive provide that ‘[v]ideo clips embedded in editorial content of electronic versions of newspapers and magazines and animated images such as GIFs should not be covered by this Directive’.⁶⁷ This exclusion for GIFs is unusual because it is expressly not technology neutral; GIF means graphics interchange format. It also raises the question of where the boundary between an animated GIF (or a series of them) and a very short cartoon lies,⁶⁸ especially since New Media Online suggests that length is not determinative – at least in relation to audiovisual media. Presumably a social media platform which allowed users to share photographs⁶⁹ would not fall within the definition; nor a platform that was text-based (or text plus photographs), such as Mumsnet.⁷⁰

A further question concerns the meaning of ‘user’. There is no definition of and therefore no limitation on who can be a user. A user would probably be defined functionally as anyone (legal or natural person) who uses the service. While the content does not need to be uploaded by its creator but can be uploaded by a different user, the phrase ‘created by a user and uploaded to a video-sharing platform by that user or any other user’ suggests that both users must be users of the same platform (unless ‘user’ is taken to mean user of anything, which seems unlikely), potentially excluding cross platform re-postings. This broad definition may allow some content that could be categorised as a programme within audiovisual

media service to be categorised as user-generated video in the context of VSPs (provided the creator was a user). Conversely, the fact that the creator must be a user to satisfy the definition of user-generated video means that unless the creator is a user of pirate video sharing sites, which is unlikely, then platforms specialising in sharing pirated content (specifically that of a type constituting a programme) would not fall within the definition.⁷¹

Another question relates to the scope of creation; creation does not necessarily require artistic intent but would the clips of, for example, dashcam footage, taken automatically, satisfy this requirement? Such content was assumed not to fall into the scope of audiovisual content. Presumably we can suggest that creation also covers the situation where a user has edited or amended existing content. The issue of on-line games (for example Twitch,⁷² where gamers stream their play via this platform) raises further questions about co-creation. In many instances, the gamer players in a digital environment created by the games company; in that sense the gamer/user did not create the content. The gamer/user would, however, create the content that is the particular instance of game play, albeit against a backdrop provided by the third party. Could it be argued that this is enough to trigger the application of the VSP rules?

The requirement that the service be provided across an electronic communications network should not give rise to many problems. It is a reference to the wide range of transmission services caught by the EU telecommunications regime, which would include cable, satellite and wireless systems (eg mobile, wifi) and is designed to exclude content distribution via physical items such as DVDs.

Obligations of VSP providers

The substantive rules are found in Article 28b, with Article 28a dealing with jurisdictional issues relating to group companies. It seems that the intention is that only the rules in this section should apply to VSPs and not the provisions in the Directive generally. The Commission's proposal required Member States to put an obligation on VSP providers to take 'appropriate measures' to protect two groups of people from two groups of harms reflecting the concerns in relation to audiovisual media services: protection of minors; and prohibition on hate speech. From the Commission's initiatives with social media companies to establish a Code of Conduct countering hate speech,⁷³ it may be inferred that the driver here is concern about hate speech although the need to protect minors remains a live issue.⁷⁴ The original proposal contained in its second paragraph an exhaustive list of the sorts of measures that could be required. A third paragraph specified that Member States were to 'encourage' co-regulation with the appropriateness of the measures being assessed by the national independent regulatory authority. Significantly, Member States were precluded from imposing stricter measures, save with respect to illegal content. These conditions were expressed to be without prejudice to Articles 14 and 15 of the e-Commerce Directive. The agreed revised version has moved significantly from this approach. The provision which would have made part of the revised AVMSD (including Art 28b) a total harmonisation measure is no more. Thus the entire Directive retains a minimum harmonisation approach, though different provisions apply to the AVMSD rules from those applicable to VSPs (see Art 28b(6)).

There is an extended list of harms against which measures should be taken. Further, Article 28b(3) is no longer expressed as an exhaustive list.

A preliminary point to note is that the VSP provisions seemed to be intended to be separate from the rest of the Directive and that the general rules applicable to audiovisual media services do not apply to VSPs. One of the rules not so applying is the rule setting down the principle of free movement – that is the requirement on Member States to ensure freedom of reception and not to restrict retransmission.⁷⁵ Presumably, it was thought unnecessary to state this principle because the VSP providers, being information society service providers, would otherwise be governed by the e-Commerce Directive, as recognised in recital (44) revised AVMSD; that free movement obligation is expressed to apply in relation to the field coordinated⁷⁶ by that Directive – not the AVMSD in relation to audiovisual media services.⁷⁷ Essentially the rules in Article 28a and 28b ‘overhang’ the terrain occupied by the e-Commerce Directive leaving anything not expressly dealt with to be considered under the e-Commerce Directive. The obvious, arguably ‘better’ solution, of amending the e-Commerce Directive was excluded by the Platforms Communication; presumably there was a concern that it was unnecessary or undesirable to impose these obligations across the sector as a whole. Article 4(8) revised AVMSD specifies that the e-Commerce Directive ‘shall apply unless otherwise provided for in this Directive’, and is a provision that was found in the original AVMSD.⁷⁸ There are two points of uncertainty with regard to Article 4(8).

First, it is unclear whether the intention is that an AVMSD rule on a topic would displace a rule in the e-Commerce Directive on the same topic entirely, or whether this provision means that such a rule could continue to apply until its content trespasses on the terrain expressly covered by the provision in the AVMSD. The provision also provides for a conflict resolution rule whereby the revised AVMSD trumps the e-Commerce Directive unless the revised AVMSD provides otherwise. This latter rule makes sense because otherwise the more general set of rules (in the e-Commerce Directive) could undermine the more specific AVMSD. For this rule to trigger it may be that the conflict could arise as a result of the interpretation of the revised AVMSD. Conversely, it seems likely that the specification of the priority of the e-Commerce Directive would need to be express.

Second, this conflict rule is located in the part of the Directive devoted to audiovisual media services Directive; the VSP provisions are in a separate chapter. This context could be therefore be taken as implying that the provision does not relate to the VSP provisions. The text is ambiguous. While Article 4 in general concerns Member States’ ability to impose stricter standards on AVM service providers (and there is a separate specific provision doing the same for VSP service providers at Art 28b(6)), the text of the specific paragraph containing the conflict rule, Article 4(8), is not expressed to be limited audiovisual media services. Although the conflict rule was first introduced to deal with possible conflicts in relation to non-linear services (which also satisfy the definition of information society services), the main place where conflict between the two Directives is likely is in relation to the VSP provisions.

Article 28b(1) identifies the public interest objectives in respect of which Member States are obliged to ensure VSP providers take appropriate measures. It is highly unlikely that this constitutes a complete coverage of the field, specifically in terms of

the obligations that Member States may impose on those operators established in their own territories.⁷⁹ Within the context of audiovisual media, the court has recognised that advertising and consumer protection matters are not exhaustively dealt with by the Directive,⁸⁰ a point that is recognised in the recitals. Moreover, the court has held that public policy issues are not fully harmonised⁸¹ and it seems that some issues – media plurality – are not dealt with either.⁸² Insofar as the scope of the eCommerce Directive is concerned, the harmonised field is broader covering, for example, civil defamation rules.⁸³ The main purpose of the e-Commerce Directive is, however, different from the AVMSD in that it does not require Member States to set down specific rules but instead institutes a framework within which Member States' own policy choices operate. The exceptions from the free movement principle found in Article 3(4) of the e-Commerce Directive would also be relevant here. This is a broader list that found in relation to audiovisual media services including crime investigation and prosecution, protection of investors and consumers, public security.⁸⁴ In sum, Member States could be free to take measures in fields not listed in Article 28b(1) and while they could not impose them on operators established in other Member States (on establishment see Art 28a below), there is still some possibility for derogation by reference to the grounds listed in the e-Commerce Directive.

There are three themes running through the three categories in respect of which Member States must take action. First, the listing of the varieties of content triggering the obligations, all of which are audiovisual, suggests that those obligations do not apply to any other types of content (text, still image) found on the relevant service. Second, none of the defined terms listed expressly requires the relevant content caught by the definition to be generally available; that requirement applies to the underpinning VSP service. Does this mean that VSP providers should take measures in relation to content shared in closed groups? Third, although recital (45) emphasises that measures taken should relate to the organisation of content (ie the underlying systems) 'not to the content as such', action is to be taken in relation to threats from the content carried not threats arising from the system itself. For example, were the addictive nature of system design itself to be proven, it would not seem to fall within the threats addressed by Article 28b(1). Further, the threats may emanate from audiovisual commercial communications as well as from 'user-generated videos' and 'programmes'. It is unclear how this obligation in relation to commercial communications found in Article 28b(1) relates to the obligation in Article 28b(2) to ensure that VSP providers comply with the rules on commercial communications found in Article 9(1) revised AVMSD. Presumably other forms of threat are envisaged, though Article 9(1) inter alia prohibits communications that prejudice respect for human dignity, include or promote discrimination on the basis of protected characteristics and requires that such communications should not cause physical, mental or moral detriment to minors. As specifically recognised by recital (46) to the revised AVMSD, this relationship must, in any event, be understood against the Unfair Commercial Practices Directive⁸⁵ and other pieces of consumer protection legislation,⁸⁶ especially given the recognition that the AVMSD does not fully harmonise this field.⁸⁷

The first category of content to be tackled is that which 'may impair [minors] physical, mental or moral development'.⁸⁸ This reflects the similar obligations applied to both linear services as well as video on demand and which can now be found at

Article 6a revised AVMSD. Consequently, this phrase should be interpreted in line with those provisions. The text of the provision – by contrast to earlier analogous provisions in TWFD – gives no information as to the type of content that would be caught. Despite the change in wording the former provisions offer a starting point. So, though violent pornography (as understood in each of the Member States' own legal systems), violence – especially extreme or gratuitous violence, would probably be included. Article 6a(1) describes 'gratuitous violence and pornography' as the most harmful content suggesting, something less than this would still be harmful. Gratuitous suggests context should be taken into account, so that – for example – war reporting might not fall within this prohibition; it is unclear whether the re-posting of violent clips with the disingenuous comment 'I don't think this should happen' would be saved by this reasoning. 'Gratuitous' appears to qualify only 'violence' and not pornography. In relation to the analogous provisions relating to audiovisual media service providers, these two categories are not viewed as constituting an exhaustive list of harmful content. Further, it has been recognised that there is considerable difference of opinion between the Member States as to what constitutes problematic content; furthermore there is little standardisation as to the age of protection for minors. Note also the level of harm required: the content needs only to be found to impair such development. Previously, services were required to seriously impair minors' development, so standardising across all services at this lower standard constitutes somewhat of a shift in protection.

Article 28b(1)(a) specifies that the protection from developmental harm should be 'in accordance with Article 6a(1)', the provision that deals with protection of minors in regards to audiovisual media services. It is unclear what this requirement means. It could suggest that the type of content affected is the same for both Article 28b(1)(a) and Article 6a(1). Article 6a(1) specifies that such content may be made available only 'in such a way as to ensure that minors will not normally hear or see them', thus providing a base level for the meaning of effective protection. Moreover, Article 6a(1) also specifies that the most harmful content is to be subject to the strictest measures, though what this obligation requires beyond not letting them be accessible, which is the obligation in relation to content that is less than the most harmful, is hard to envisage.

The next two categories of content require protection of adults as well as minors. The scope of the obligation is to the 'general public' – presumably this is everyone within a Member State's territory and not implying any extra-territorial obligation to protect. There is a similarity between the prohibition found in Article 28b(1)(b) and that found in Article 6(1)(ab) in relation to protection from content inciting violence or hatred. The categories of protected characteristics in relation to incitement to hatred have been expanded and now track Article 21 of the EU Charter setting out the prohibition on discrimination. The characteristics are 'any ground' but specifically: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, as well as nationality discrimination. This is a broad range, some of which might come as a bit of a shock to some social media 'commentators'; there is currently barely recognition of the problem caused by misogynistic hate speech let alone that based on 'genetic features'⁸⁹ or property. Given that the next paragraph deals with hate speech that constitutes a criminal offence, it would seem that the content covered here need not be as serious as that

which would trigger such an offence – otherwise there is pure overlap between the provisions. Nonetheless the reference to incitement to hatred’ implies some threshold of severity before the content falls within Article 28b(1)(b). It is, however, unclear whether incitement to violence must be directed against a category of persons by reference to these protected characteristics or whether it includes any such incitement, eg incitement to riot to protest against austerity. It depends whether the aim of the provision is to protect the subject of the speech, or to protect society against the effect of having such speech available in terms of what that sort of speech does to social relations.

The third category goes beyond Article 6(1)(b), which deals with public provocation to commit a terrorist offence. Article 28b(1)(c) requires protection for the general public from content ‘the dissemination of which constitutes an activity which is a criminal offence under Union law’. It specifies the offences of public provocation to commit a terrorist offence;⁹⁰ child pornography⁹¹ and certain expressions of racism and xenophobia.⁹² Note that Member States are already obliged to seek removal of child pornography and incitement to terrorism.⁹³ The cross referencing to these other measures mean that the definition of the offences is part of EU law, perhaps in an attempt to reduce difference in what is acceptable between Member States. This Europeanisation of meaning is defended on the grounds of the need to ensure coherence of EU law.⁹⁴ It seems that these are just particular examples⁹⁵ of types of problematic content that are definitely within scope of the provision. The question is what else might be covered? The phrase ‘Union law’ is ambiguous. It is unclear whether this phrase might cover only offences specified by EU secondary legislation, the areas in which the EU has specific competence to act in the criminal field,⁹⁶ or indeed the activities of Member States when implementing EU law where criminal offences are not required but are permissible. Given that this is an obligation that the Member States are required to implement a need for legal certainty would point us to the direction of the first interpretation. Assuming the field is not fully harmonised, Member States can give wider protection – for example in relation to content that is criminal under national law but not by virtue of EU law requirements.

As noted Article 9(1) is to be applicable in the context of VSPs. Article 9(1) has rules relating to identifiability of advertising, a ban on subliminal techniques, a list of prohibited content, a prohibition on certain products being advertised as well as rules relating to the advertising of alcoholic beverages and medicinal products. Article 9(1)(g) elaborates on the prohibition on causing physical, mental or moral detriment to minors that adverts should not exhort minors to buy products. There is a distinction between the situation where the VSP provider ‘markets sells or arranges’ the commercial communication or not. If it does, the obligation is to comply with Article 9(1); if it does not, it should take appropriate measures (as for Art 28b(3)(a)–(j)). Further, there is an exhortation to encourage co- and self-regulation in relation to HFSS foods – in line with the approach taken for AVM services. This is an attempt to limit the ability of brands to try to avoid limitations on advertising by taking it on-line; it may also make clear to ‘influencers’ that they are under regulatory control. As far as the UK is concerned, the ASA has attempted to take action in relation to social media but the effect of the Directive (if implemented post-Brexit) would be to move the scheme from self-regulation to coregulation or even direct regulation.

Article 28b(3) specifies the nature of ‘appropriate measures’, introducing a multi-way proportionality test, taking into account the interests of the provider (including its size) as well as those of the user. Note that there is no de minimis threshold – all VSP providers in the jurisdiction would be caught, making determination of scope especially significant. The provisions lists ten sorts of measures that a VSP provider could take. They include legal matters (applying the terms of service; providing complaints mechanisms) and technical measures (eg age verification and parental controls) as well as media literacy measures and to some extent parallel (albeit in more detail) the approach taken with regard to harmful content under Article 6a revised AVMSD. The measures are not focused on take-down but rather ensuring that the problematic content does not come to the attention of the protected groups of users; it is questionable whether this approach fully deals with the issue of criminal content. Member States may not impose a general monitoring obligation contrary to Article 15 of the e-Commerce Directive. It remains to be seen the extent to which video-sharing platforms may choose – of their own commercial choice – to impose such measures.

While it seems that the VSP provider will be able to choose which measures to apply⁹⁷ to its own service and how, the appropriateness of those measures is to be overseen by the national regulatory authority.⁹⁸ Although there are aspirations towards co-regulation,⁹⁹ self-regulation will not be an option. Although this is in line with a general enthusiasm for alternative forms of governance, the recitals show some scepticism about the effectiveness as [c]o-regulation should allow for the possibility of State intervention in the event of its objectives not being met.¹⁰⁰ Article 4a, which deals with co-regulation, specifies conditions with which co-regulatory codes should comply. While Article 4a is located in the main section of the revised AVMSD dealing with media services, Article 4a(1) specifies that it applies to ‘the fields coordinated by this Directive’ which would seem to include the VSP provisions. So any co-regulatory codes should provide for effective enforcement and be monitored by the regulator.¹⁰¹ Note, however, that the Directive does envisage the possibility of pan-European codes being fostered in this area.¹⁰² While the objective of this provision could be merely to provide (regulatory) space for such an eventuality, this possibility seems in tension with Article 28b(4) and (5).

By contrast to the Commission’s original proposal, Article 28b is a minimum harmonisation provision. Article 28b(6) specifies that Member States may impose ‘more detailed or stricter measures than the measures referred to in paragraph 3’. Not only could Member States, specify how a tool could be adopted (eg requiring operators to contribute to a mediation system in relation to complaint resolution mechanisms¹⁰³) add to the list of types of measures (for example, suggest new services to be subject to a safety audit before deployment), but could move to require operators to adopt certain tools (rather than having the choice of what to do themselves: eg make age verification mandatory). The requirements of Article 6a(1) may also affect choices in this context. The recitals also recognised the need to respect fundamental human rights: the right to respect for family life, the protection of personal data, freedom of expression, the freedom to conduct a business as well as the rights of the child.¹⁰⁴ Given the complexity of this balancing, it would be difficult to predict the ‘right’ answer in any given situation. The specific reference to Article 28b(3) would seem to be aimed at creating the link between this paragraph and the rest of Article 28b, avoiding overlap with the minimum harmonisation provision in

Article 4, which relates to AVM service providers only. A suggestion that the reference to paragraph 3 in some way limits the public interest grounds in paragraph 1 seems untenable in the light of existing jurisprudence on minimum harmonisation which seems to extend 'stricter' to 'wider' as well as 'higher' standards.¹⁰⁵ There is a blurring between the issue of minimum harmonisation and the question of whether the field is fully occupied.¹⁰⁶ As noted above, it seems that in terms of public policy, the field is not fully harmonised.¹⁰⁷

A couple of other unconnected points should be noted. First, reflecting increased concerns about data (privacy), Article 28b(3) prohibits the use of personal data connected to the use of age verification systems and parental controls are not to be used for commercial purposes. The provision specifies that such purposes include direct marketing, profiling and behaviourally targeted advertising. This protection is limited to the data of minors (age unspecified) but is not limited to data directly provided by the user. The provision expressly includes personal data 'otherwise generated' by VSP operators. This is in addition to and independent of any obligation imposed by the GDPR though presumably a Member State is free to specify that its data protection supervisory body is the relevant national regulatory authority in this context. Article 30(1) revised AVMSD permits Member States to designate more than one regulatory authority for the purposes of the Directive; moreover, supervisory authorities for the purposes of the GDPR will satisfy the independence requirements for national regulators set down in the revised AVMSD.¹⁰⁸

Second, Article 28b(7) and (8) together provide that Member States are required to ensure that both (independent and impartial) out-of-court redress mechanisms and the right to go court are available to users – and it seems that is to be available in all cases. Although procedural rules are a matter of national law, they must not impinge on the effectiveness of EU law. Presumably rules which direct smaller claims to lower courts or which given specialist courts jurisdiction over some matters would not be affected. It is unclear, however, what 'rights' are in issue. Specifically, is this no more than saying that whatever rights you may have under national law, you can take to court, or is it specifying that users in some way have rights of enforcement in respect of matters identified in Article 28b(1) and (2)?

Jurisdictional issues

Article 28a deals with jurisdiction and regulatory competence. The starting point is the test of establishment so that a company is regulated in the Member State in which is established, according to Article 3 eCommerce Directive,¹⁰⁹ establishment to be determined according to standard EU case law,¹¹⁰ rather than the specific rules established in relation to Audiovisual Media Service providers. Article 28a adds a gloss to the position in the e-Commerce Directive, trying to address non-establishment in the EU¹¹¹ with multiple subsidiaries. Even if the VSP provider is not established in the EU but another group member company is (eg a company selling advertising to provide revenue for the VSP provider). When there are multiple subsidiaries then the company which started continuous operations the longest ago in time in the same Member State determines jurisdiction for an out-of-EU VSP providers. Clearly these are complex rules so the Directive envisages that Member States should notify the Commission as to which VSP providers are established within their respective territories; the Commission then has the job of ironing out any

inconsistencies with the assistance of the European Regulators Group for Audiovisual Media Services (ERGA), a body which is re-established by the revised AVMSD.¹¹²

Conclusions

The question of boundaries of the AVMSD's scope has long been complex. There are unanswered questions about the meaning of audiovisual media services. To these issues have been added further difficulties. While the limitation to video makes sense in the context of the rationale for the Directive as a whole, in the context of social media platforms it has little to commend it. In addition to the difficulties of applying legal definitions to changing technologies with varying and varied uses, the drafting in some instances is ambiguous – perhaps as a result of political compromise. There are many questions about how this Directive will relate to others in the field, and whether the development of new obligations will apply logically and coherently or, rather, differentially depending on small differences and/or ambiguities in wording. By comparison, the scope of the obligations to be imposed seem relatively clear. The question here – especially for the pan-EU companies – is the extent to which Member States will accept these minima, as well as the level of control Member States seek to exert. Perhaps the only certainty is that things will be changing somehow for companies that until recently have been seen to be beyond regulation.

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My thanks to Professor Twigg-Flesner, who commented on a draft of this article; errors remain my own.

Notes

1. Commission, Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe (COM(2016) 288 final), 25 May 2016.
2. While the term 'platform' is increasingly used to describe a range of actors – eg social networks, Uber and AirBNB – there is no agreed definition and certainly not a legally described one. The Commission in its Communication on Online Platforms, identified some common characteristics, p 1. These give rise to questions too, see IRIS pp 14–15. The Commission has put forward a proposal for a Regulation on promoting fairness and transparency for business users of online intermediation service (COM(2018) 238 final), which includes a definition of online intermediation services (Art 2); the relationship between this, the e-Commerce Directive and the revised AVMSD is not yet fully clear.
3. Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce in the Internal Market [2000] OJ L 178/1.
4. Proposal for a Directive of the European Parliament and of the Council amending Dir 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM/2016/0287 final–2016/0151 (COD)), 25 May 2016.
5. Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L 95/1 (CONSOLIDATED VERSION) (AVMSD), incorporating the changes from Directive 2007/65/EC (2nd amendment to Television without Frontiers).
6. Originally Dir 89/552/EEC [1989] OJ L 298/23, it was amended in 1997 by Dir 2007/65/EC [1997] OJ L 202/30.
7. Council Proposal amending Dir 2010/13 – Analysis of the final compromise text with a view to agreement (9817/18), 8 June 2018.
8. 2016/0151 (COD), PE CONS 33/18. The main difference between this version and that agreed at trilogue is that the order of Arts 28a and 28b has been reversed.
9. Recital 16, AVMSD.
10. Article 28b(1)(a), revised AVMSD.
11. Article 28b(1)(b), revised AVMSD.
12. Article 28b(1)(c), revised AVMSD.
13. Article 28b(2), revised AVMSD.
14. Article 1(1)(aa), revised AVMSD.
15. Article 1(1)(ba), revised AVMSD.
16. Article 1(1) (da), revised AVMSD.
17. Article 1(1)(b), revised AVMSD.
18. Article 1(1)(c), revised AVMSD.
19. Article 1(1)(a)(i), revised AVMSD.
20. Case 352-85 Bond van Adverteerders [1988] ECR 2085; for discussion see eg L Woods, Free Movement of Goods and Services within the European Community (Aldershot, Ashgate

- Publishing, 2004), pp 159 et seq; J Snell *Goods and Services in EU Law: A Study of the Relationship between the Freedoms* (Oxford, Oxford University Press, 2002) pp 6–14.
21. K Böttcher and O Castendyk, 'Comments on Services' in Castendyk, Dommering and Scheuer (eds) *European Media Law* (Alphen a/d Rijn, Kluwer Law International, 2008), para 45.
 22. IRIS, p 14.
 23. Article 1(1)(c), revised AVMSD.
 24. Recital 19, AVMSD.
 25. R Chavannes and O Castendyk, 'Comments on Article 1 AVMSD', in Castendyk, Dommering and Scheuer (eds) *European Media Law* (Alphen a/d Rijn, Kluwer Law International, 2008), para 73.
 26. This is the type of service covered by the e-Commerce Directive, see Art 2(a), which cross-refers to Art 1(2) Dir 98/34/EC as amended by Dir 98/48/EC, which definition is 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'; broadcasting services that fall under the TWFD/AVMSD are expressly excluded.
 27. Recital (48), revised AVMSD.
 28. Article 13, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – COM(2016)593.
 29. General Secretariat of the Council, Proposal for a Directive amending Dir 2010/13/EU: Preparation for the trilogue, 17 April 2018 (7106/18).
 30. Recital (4), revised AVMSD.
 31. Article 1(1)(a)(i), AVMSD and also as revised.
 32. Chavannes and Castendyk, para 37.
 33. IRIS p 24, but contrast P Valcke and J Ausloos, 'Audiovisual Media Services 3.0: (Re)defining the Scope of European Broadcasting Law in a Converging and Connected Media Environment' in Donders et al (eds) *The Palgrave Handbook of European Media Policy* (Basingstoke, Palgrave Macmillan, 2014), p 323.
 34. Case C-132/17 *Peugot Deutschland GmbH v Deutsche Umwelthilfe eV*, judgment 21 February 2018.
 35. Valcke and Ausloos, pp 318–19.
 36. Recital (6), revised AVMSD.
 37. Article 1(1)(a)(i), AVMSD and as revised.
 38. Case C-347/14 *New Media Online GmbH v Bundeskommunikationssenat*, 21 October 2015.
 39. Recital 3, revised AVMSD.
 40. On the approach taken by national regulators under the AVMSD, see Valcke and Ausloos, pp 319–21.
 41. Recital (5), revised AVMSD.
 42. Recital (5), revised AVMSD.

43. New Media Online; while Peugeot curtailed the scope of some definitions the effect was that more detailed consumer protection rules fell on the content provider.
44. Note the running order of the phraseology is different between the two definitions. For 'Audiovisual Media Services' it is 'providing programmes, under the editorial responsibility of a media service provider, in order to inform, entertain or educate, to the general public', whilst VSPs require 'providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform does not have editorial responsibility'. It is submitted that the clause order in relation to audiovisual media services is better than that in relation to VSPs but that nothing turns on the difference.
45. Chavannes and Castendyk, para 39.
46. Valcke and Ausloos, pp 322–23.
47. Chavannes and Castendyk, para 41 et seq.
48. Case C-89/04 Mediakabel [2005] ECR I-4891, para 30.
49. Case C-117/15 Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), EU:C:2016:379, para 42.
50. Cases C-403/08 and C-429/08 Football Association Premier League Ltd and others [2011] ECR I-9083; Case C-306/05 Sociedad General de Autores y Editores de España v Rafael Hoteles SA [2006] ECR I-11519; Case C-351/12 Ochranný svaz autorský pro práva k dílu hudebním, os v Léčebné lázní Mariánské Lázně as ECLI:EU:C:2014:110.
51. 49 Case C-160/15 GS Media, EU:C:2016:644; see also eg Case C-607/11 ITV Broadcasting EU:C:2013:147, para 32.
52. Case C-135/10 Società Consortile Fonografici (SCF) v Marco Del Corso ECLI:EU:C:2012:140.
53. Reha.
54. Chavannes and Castendyk, para 47.
55. Reha, para 28; FAPL, para 188; see also emphasis on coherence in recitals (17) and (18) revised AVMSD.
56. GS Media, para 30.
57. Chavannes and Castendyk, para 43.
58. Recital (4), revised AVMSD.
59. See variously Eleqt.com; asmallworld.net; the 'kommunity' on killingkittens.com.
60. See remarkablelives.co.uk, which is a site aimed at celebrating and recording the lives of older individuals; it does not seem to have video content so would be outside the regime in any event.
61. Article 1(1)(a)(i), AVMSD.
62. The definition of 'programme' also required the audiovisual content to be 'comparable to the form and content of television broadcasting', a requirement which will be deleted by the revised AVMSD.
63. Chavannes and Castendyk, para 56.

64. See comments on 'general public'.
65. New Media Online, referring to recital (21) AVMSD.
66. The issue of whether radio stations which also provide a video feed from the studio (or other video) using internet capacity are still 'just radio' has not been addressed.
67. Recital (6), revised AVMSD.
68. Note that there seems to be no limit on how long a GIF can be, though the way the programmes were intended to be read and run may impose limits in real use – see here a one minute long GIF: <https://giphy.com/gifs/3o6gDXBVctFi1mjR6g> [accessed 23 July 2018].
69. Pinterest might be an example; it is mainly photographs plus some text but since 2016 it is possible to share videos via Pinterest.
70. Mumsnet has a YouTube channel but it seems to be separate from the main site; the video channel so provided might itself be an audiovisual media service of which Mumsnet is the service provider – see recital 3 revised AVMSD.
71. This point also assumes that such platforms were 'providing' the content – see discussion about direct and indirect provision.
72. <https://www.twitch.tv/>.
73. European Commission, 'Countering online hate speech – Commission initiative with social media platforms and civil society shows progress' (press release), 1 June 2017.
74. Recital (45) revised AVMSD.
75. Article 3(1), revised AVMSD.
76. Article 2(h)(i), eCommerce Directive.
77. Article 3(1), e-Commerce Directive.
78. On the history of this provision, see eg IRIS, s 2.3.1.
79. Case C-34-36/95 De Agostini [1997] ECR I-3891, paras 33–38.
80. De Agostini.
81. Cases C-244/10 and C-245/10 Mesopotamia Broadcast A/S METV (C-244/10) and Roj TV A/S (C-245/10) v Germany, judgment 22 September 2011, ECLI:EU:C:2011:607, para 37.
82. Case C-11/95 Commission v Belgium, discussed A Scheuer and T Ader, 'Comments on Article 3 TWFD' in Castendyk et al (eds) European Media Law (Alphen a/d Rijn, Kluwer Law International, 2008), para 38; see now recital (49) revised AVMSD.
83. Case C-291/13 Papisavvas v O Fileleftheros Dimosia Etairia Ltd, Takis Kounnafi, Giorgos Sertis, judgment 11 September 2014, ECLI:EU:C:2014:2209.
84. Note that the position with regard to human dignity is not clear. The e-Commerce Directive permits Member States to taken action to protect human dignity; the relevant provision in relation to audiovisual media services is arguably limited to incitement to violence or hatred in Art 6(1)(a).
85. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and

amending Council Dir 84/450/EEC, Dirs 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), [2005] OJ L 149/22.

86. See overview in IRIS, paras 2.3.4 and 2.3.5.
87. Recital (10), revised AVMSD.
88. Article 28b(1)(a), revised AVMSD.
89. This is drawn from the 1997 Council of Europe Convention on Human Rights and Biomedicine which refers to 'genetic heritage', see C Kilpatrick, 'Article 21' in Peers et al (eds) *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014) para 21.24.
90. Article 5, Terrorism Directive (Dir 2017/541) [2017] OJ L 88/6.
91. Article 5(4), Dir 2011/92 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335/1.
92. Article 1, Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55.
93. Article 21, Terrorism Directive; Article 25 Child Pornography Directive.
94. Recitals (17) and (18), revised AVMSD.
95. The word used to introduce the list is 'namely' which means particularly – so this does not seem to be an exhaustive list.
96. Article 83, TFEU specifies: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Offences specified by Union legislation are an additional category: Article 83(2) TFEU.
97. The phraseology in Art 28b(3), para 2, that '[s]uch measures shall be applied to all video-sharing platforms' (emphasis added) seems wrong; presumably the obligation to take measures should be applied, not the measures themselves.
98. Article 28b(5), revised AVMSD.
99. Article 28b(4), revised AVMSD.
100. Recital (7a), revised AVMSD.
101. Recital (7), Art 4a revised AVMSD.
102. Article 28(b), revised AVMSD.
103. Article 28b(3)(i), revised AVMSD.
104. Recital (60), revised AVMSD.
105. C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbank)* [2010] ECR I-4785 in relation to a similarly worded clause.
106. S Weatherill, 'Case note on Gallaher' (1994) 19 *ELRev* 55, p 66.
107. Mesopotamia.
108. Article 30(1)–(7), revised AVMSD.

109. Article 28a (1), revised AVMSD.
110. Case C-221/89 Factortame [1991] ECR I-3905; Case C-222/94 Commission v UK [1996] ECR I-4025.
111. Recital (44), revised AVMSD.
112. Article 30a, revised AVMSD.